89-605

No. _____

In The

Supreme Court of the United States

October Term, 1989

LAWRENCE M. ROBERTSON, JR., M.D.,

Petitioner,

v.

STATE BOARD OF MEDICAL EXAMINERS, an agency of the State of Colorado; GENE E. BOLLES, M.D.; HENRY G. FIEGER, M.D.; NANCY GERLOCK; JACK KLAPPER, M.D.; STEPHEN R. KOSLOFF, M.D.; ROBERT LEDERER, M.D.; NELSON E. MOHLER, D.O.; FREDERICK R. PAQUETTE, M.D.; CHRISTINE A. PETERSEN, M.D.; RAY E. PIPER, D.O.; MOLLY SOMMERVILLE, ESQ.; BRUCE WILSON, M.D.; MICHAEL VITEK, M.D., each as individuals of that agency,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTION PRESENTED FOR REVIEW

Whether the State Board of Medical Examiners of Colorado and its members are entitled to absolute immunity from civil liability in all of its actions, whether investigative, prosecutorial or quasi-judicial in nature without consideration of the factual basis of alleged:

A. Violations of procedural or substantive due process;

B. Arbitrary and capricious actions;

C. Intentional or reckless misconduct which wrongfully deprives the petitioner of his right and privilege to practice his profession.

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No. _____

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OPINIONS BELOW

The opinion of the three judge panel of the United States Court of Appeals for the Tenth Circuit was filed June 22, 1989, (Appendix A). A petition for rehearing was

denied by this Court on August 16, 1989, (Appendix H). The United States District Court for the District of Colorado granted summary judgment for the respondents on December 28, 1987, (Appendix G)

JURISDICTION

The three judge panel of the Tenth Circuit Court of Appeals entered its judgment on June 22, 1989 and petition for rehearing was denied by this Court of August 16, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1):

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 706:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and

> (2) hold unlawful and set aside agency action findings and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Administrative action

In a stipulation (Appendix B) entered into between the Board of Medical Examiners and Dr. Robertson on August 9, 1982, the Board dropped all charges of unprofessional conduct and Robertson stipulated to recordkeeping errors. The terms of the stipulation required the Plaintiff to:

1. Participate in 50 hours of continuing medical education a year for the next three years;
2. Notify the Board prior to the commencement of the practice of surgery;
3. Have a mutually acceptable monitor to review Robertson's practice and to send in monthly reports to the Board;
4. Undergo a psychiatric examination.

On October 27, 1982, a report of psychiatric evaluation was sent to the Board by Dr. Johnston (Appendix C) who stated in paragraph 4 of that report: "He is seeing some office patients and devotes most of his time to law school."

Shortly after entering into the stipulation, Robertson enlisted Harry Boyd, M.D., a Board certified neurosurgeon, as his monitor. Boyd did monitor the Robertson's practice but failed to send monthly reports to the Board (Appendix E at App. page 39, paragraph 2). The impartial Hearing Officer appointed by the Board found as follows (Appendix E at App. page 39, paragraph 2):

> The preponderance of the evidence demonstrates that Dr. Boyd did thoroughly and conscientiously monitor the records of practice of Respondent based upon Respondent's charts. He did not conduct any independent investigation of Respondent's office practice.

And at Appendix E, App. page 45, paragraph 3 the Hearing Officer stated:

> The provisions of paragraph 12 were not strictly met because the Board never accepted Boyd as a monitor and he never filed periodic reports with the Board.

Robertson had informed his attorney, Alex Keller, Esq. that Dr. Harry Boyd, M.D., a Board certified neurosurgeon, was monitoring the practice. Pursuant to the stipulation Mr. Keller advised the then Assistant Attorney General, Mr. Arcuri, of the fact. Mr. Arcuri failed to inform the Board of this fact. (See Appendix E, App. page 37, paragraph 1 and App. page 45, paragraph 2).

On March 22, 1984, Robertson removed a skin lesion from one of his patients as an outpatient under local anesthesia. Robertson, a neurosurgeon, did not consider this "lump and bump" surgery as a "commencement of the practice of surgery," as referred to in the stipulation,

but reported this surgical activity to the Board through his attorney.

In March, 1984, Robertson was retained by a plaintiff's attorney to examine and render a professional opinion regarding, Mr. Parker, in a nursing malpractice claim entitled *Parker v. Mercy Hospital* filed in Denver District Court (83CV5486). Dr. Robertson had his deposition taken on May 2, 1984, by the Defendant and the following was reported:

QUESTION: "About how many patients do you see per month?" with a reply

ANSWER: "Probably 25 to 30."

This deposition was sent to the Defendant's expert, Dr. Klapper, a member of the Board.[1] On the same date that Robertson testified in the Parker case (June 26, 1984), he was served with a complaint and an order of summary suspension of his license to practice medicine.

The complaint listed alleged violations of the stipulation as follows:

1. No completion of any continuing medical education (paragraph 13 of the stipulation, Appendix B)
2. No monitoring of Dr. Robertson's practice (paragraph 12 of the Stipulation, Appendix B)

---

[1] Apparently acting as an investigative aid to the Attorney General, provided a copy of the deposition to the attorney general office on May 7, 1984, claiming the sworn deposition testimony proved a violation of the stipulation.

3. No notification of the commencement of the practice of surgery

(paragraphs 9-11 of the Stipulation, Appendix B)

B. Disposition of Charges

1. The Board dropped the continuing medical education charge.[2]

2. The impartial Hearing Officer found that the surgery perfomed in March, 1984 was not the commencement of the practice surgery, (Appendix E, App. page 47)

3. The impartial Hearing Officer stated in his findings (Appendix E, App. page 39, paragraph 2):

"The preponderance of the evidence demonstrates that Dr. Boyd did thoroughly and conscientiously monitor the records of practice. . . ."

And the Hearing Officer stated at Appendix E, App. page 46, paragraph 2:

"The Hearing Officer cannot find a substantial violation of paragraph 12 [monitoring requirement] nor a violation of its spirit however."

* * *

With respect to the acceptance of the monitor by the Board, there was a breakdown in communication between the attorney general office and

---

[2] Apparently the Board dropped the continuing medical education allegation prior to the hearing. Prior to the issuance of the complaint, the petitioner had regularly during the monitoring period, attended numerous courses which totalled well over 50 hours of continuing education per year and had provided that information regularly to the Board.

the Board. (Appendix E, App. page 37, paragraph 1.)

The Hearing Officer found a *"technical violation"* as Dr. Boyd the monitor, had sent no written reports to the Board.

The impartial Hearing Officer rendered his written decision on October 22, 1984, (Appendix E). The Board took no action until March of 1985 when it not only failed to:

1. adopt the findings and opinion of the impartial Hearing Officer;
2. lift the summary suspension;
3. approve Dr. Boyd as a monitor but did unilaterally change the terms and conditions of the stipulation in regard to the "monitoring" by requiring that any licensed Neurosurgeon agreeing to monitor Robertson's medical practice. And must:
   a. Have a Board interview and
   b. Be found acceptable to the Board.[3]

---

[3] Plaintiff's evidence will show that when interviewing the board certified Professor and Head of the Neurosurgical Department of the University of Colorado Health Sciences Center who had agreed to monitor Robertson's practice [from which interview Robertson was excluded], the board advised him that to be found acceptable both detailed specific method and manner of the monitoring must be done, leaving no professional discretion to the monitor. These conditions imposed such time constraints that no practicing neurosurgeon in his opinion would or could serve as a monitor without severely limiting his own practice. No board-acceptable monitor has been found to date.

4. The Board extended the required monitoring for an additional 24 months.

The Colorado Court of Appeals upheld the Board's decision and certiorari was denied by the Colorado Supreme Court.

C. Proceedings in U.S. District Court.

On June 25, 1987 Robertson filed a complaint under the statutory provisions of 42 U.S.C. § 1983 which complaints may be summarized as follows:

1. That the summary suspension of Robertson's licensure was arbitrary, capricious and an abuse of discretion, violative of Robertson's rights under 42 U.S.C. 1983 and Const. Amend. XIV.
2. In failing to follow the findings and conclusion of the Hearing Officer who recommended and ordered that the "matter be and the same hereby is dismissed." The Board without any further hearings ruled that Robertson had violated the stipulation and placed further sanctions on Robertson. Such conduct is a wanton, reckless and malicous disregard of Robertson's rights and privileges.
3. That the Board engaged in after-the-fact rulemaking in regard to the monitoring requirement.
4. The summary suspension of licensure and the Board's conduct thereafter, violates Robertson's procedural and substantive due process rights.

5. That the Board's actions were arbitrary, capricious, and abused its discretion, was not in accordance with law, and failed to meet either statutory or constitutional requirements.

Summary judgment was entered against the petitioner based upon a ruling that all actions of the Colorado Medical Board are entitled to absolute immunity, (Appendix G).

D. The Court of Appeals Decision

Using as precedent *Horwitz v. State Board of Medical Examiners*, 822 F.2d 1508 (10th Cir. 1987), cert. denied, 108 S.Ct. 453 (1987), the United States Court of Appeals upheld the District Court's decision and rehearing was denied on August 16, 1989.

REASONS FOR GRANTING THE WRIT

A. The Tenth Circuit Court's decisions granting absolute immunity to the Colorado Board of Medical Examiners is in conflict with existing United States Supreme Court decisions interpreting the statutes and Constitution of the United States.

The concept of government immunity in the United States has developed over two centuries but had its seeds in the suit brought by Marbury against the then Secretary of State, James Madison when Madison refused to give Marbury his patent as Justice of the Peace. The Court in *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803) stated:

> the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws.

Historically citizens of the United States have been granted the right to sue for damages as a result of violation of rights and privileges granted by Const. Amend. XIV as was the case when the Court decided *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388, 395, 91 S. Ct. 1999, 2004 (1971)

> . . . historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.

The cases and legal scholars, while recognizing the principles of both qualified and absolute immunity, have wrestled with the circumstances under which each should be granted. In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the principles were further evolved and more clearly defined. When the Department of Agriculture took action against a futures commission merchant and his company seeking revocation of his registration, the Court decided the immunity issues. In *Butz*, at 438 U.S. 478, 495 the Court states:

> Accepting [the] extension of immunity with respect to state tort claims, however, we are confident that *Barr* did not purport to protect an official who has not only committed a wrong under local law, but also violated these fundamental principles of fairness embodied in the Constitution. . . . *Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know that he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional

> action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business. . . . The *Scheuer* principle of only qualified immunity for constitutional violations is consistent with *Barr v. Matteo*, *Spaulding v. Vilas*, and *Kendall v. Stokes*. But we see no substantial basis for holding, as the United States would have us do, that executive officers may with impunity discharge their duties in a way that is know to them to violate the United States Constitution or in a manner that they should know transgresses a clearly established constitutional rule.

Four years after *Butz*, the Court clearly enunciated functions entitled to absolute immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The plaintiff brought suit for damages for alleged unlawful discharge from the Department of the Air Force. At 807 the Court states:

> The absolute immunity of legislators, in their legislative functions, see, *e.g.*, *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.ED.2d 324 (1975), and of judges, in their judicial functions, see, *e.g.*, *Stump v. Sparkman*, now is well settled. Our decisions also have extended absolute immunity to certain officials of the Executive Branch. These include prosecutors and similar officials, see *Butz v. Economou*, and the President of the United States, see *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349.

And the Court at 807 explained *Butz* in the light of *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974):

> For executive officials in general, however, our cases make plain that qualified immunity represents the norm.

The Court at 812 squarely placed the burden of proof on the official by stating:

> The burden of justifying absolute immunity rests on the official asserting the claim. 438 U.S., at 506, 98 S.Ct. at 2910

* * *

And at 818:

> *We therefore hold* that government officials performing discretionary functions generally are shielded from liability for civil damage insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978); *Wood v. Strickland*, 420 U.S., at 322, 95 S.Ct., at 1001. (See also *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985))

In *Higgs v. District Court*, 713 P.2d 840 (Colo. 1985), involving flawed affidavits in which the District Attorneys drafted the affidavits and decided what information to include resulting in his arrest, Higgs, alleged that the District Attorney's participation drafting the affidavits in support of Crim. P.41 resulting in his arrest and search warrants violating his rights under Const. Amend. XIV. Following *Harlow* the Court declared qualified immunity as the norm, reasoning that there is no "litmus test" to resolve immunity but draws on three factors to help make the determination: 1) stage of the proceedings, 2) contemporaneous safeguards, and 3) traditional police functions. With respect to the first, the Court recognized a

dividing line wherein investigative functions are not absolutely immune and advocatory functions are absolutely immune. As to the second factor, the Court refers to administrative trial process. The third factor of police function was determined to have only qualified immunity.[4]

B. The Tenth Circuit Court's decisions for all actions of the Colorado Board of Medical Examiners granting absolute immunity is in conflict with decisions in the First, Sixth, Seventh and Ninth Circuits involving administrative agencies.

In *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984) a real estate developer sued the local town planning board for decisions based upon racial animus. The Court held that the Board had only qualified immunity.

In the 6th Circuit case of *Manion v. Michigan Board of Medicine*, 765 F.2d 590 (6th Cir. 1985) the physician was

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[4] A final factor is whether the challenged conduct is typically performed by police officers. As noted earlier, the Supreme Court has adopted a functional rather than a status approach in determining whether a government official is absolutely immune for particular conduct. Prosecutors are entitled to absolute immunity only for functions that are closely connected with the judicial process, i.e., advocatory functions. On the other hand, police officers have never been accorded absolute immunity for their discretionary acts. *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967). If a particular act is traditionally performed by the police that act is not sufficiently connected with the judicial process to warrant absolute immunity, even though it may be performed by a prosecutor.

terminated from a Michigan hospital for drug and alcohol problems and because he had left the community. The Court states that the trial Court must look at the official's *conduct* and *not his title*,[5] and held that the Board had only qualified immunity.

In the case of *Saxner v. Benson*, 727 F.2d 669 (7th Cir. 1984) the Court felt that the federal correctional officers had only qualified immunity.

In the case *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982) in which a former state court judge brought suit against Hawaii's State Judicial Selection Commission, the Court held the commission to have only qualified immunity.

C. The Board's actions were arbitrary and capricious and in violation of 42 U.S.C. § 1983 and U.S. Supreme Court decisions.

1. The spark that ignited the complaint and summary suspension occurred when it became known to Dr. Klapper, a Board member, that Dr. Robertson was to be a plaintiff's expert in *Parker v. Mercy Hospital*.

2. The complaint frivolously charged non-compliance of all three of the stipulation's requirements as follows:

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[5] A trial court with full knowledge of all the facts, must decide in each case whether these functions are sufficiently analogous. The general topic of officials liability and immunity is not limited to narrow legal principles, but involves broad considerations of public policy weighed against the actual functions of the officials. Robert Freilich and Richard Carlisle, *Sword and Shield 1983*, American Bar Assoc. Press (1983), at 313.

a. Non-compliance with continuing medical education (dropped by the Board). Robertson had complied totally with this requirement as reflected in the Board's own records.

b. That Robertson began "surgery". Robertson had notified the Board of the "lump and bump" surgery. The Hearing Officer found that this was not the neurosurgery as contemplated by the stipulation.

c. That Robertson failed to have his practice monitored. (The Hearing Officer found that Dr. Boyd was a qualified monitor; that the Board had to approve his acceptability; that the practice had been monitored but Dr. Boyd had not been advised of the necessity of written reports. The Hearing Officer concluded that there were no substantive violations of the stipulation.

3. The Board, arbitrarily and capriciously substituted its judgement for that of the Hearing Officer, revised the stipulation and engaged in original, oral, after-the-fact and ex parte rulemaking regarding the requirements and obligations of a monitor to the Board. This after-the-fact rulemaking has been held to be void in *Londoner v. Denver*, 210 U.S. 373 (1908). Also stated by Justice Jackson in his dissent in *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 67 S.Ct. 1575; dissent at 332 U.S. 209, 217, 67 S.Ct. 1763 (1947):

"It calls to mind Mr. Justice Cardozo's statement 'Law as a guide to conduct is reduced to the level of mere futility if it is unknown or unknowable.' "

As stated in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413, 91 S.Ct. 814, 822 (1971) by this Court in addressing sanctions to be imposed on arbitrary and capricious agency action:

> In all cases agency action must be set aside if the action was "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law" or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2)(A)(B)(C)(D).

CONCLUSION

A State licensing board is not entitled to a grant of absolute immunity without regard to the function it is performing and the factual circumstances surrounding its actions.

A licensing board performing discretionary functions may not violate clearly established constitutional rights or privileges.

It is only in the tenth circuit court jurisdiction that a plaintiff may not seek redress for alleged statutory and constitutional rights of a substantive and procedural nature when it is alleged that a board has violated those rights.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LAWRENCE M. ROBERTSON, JR., M.D.,

Plaintiff-Appellant,

v.

STATE BOARD OF MEDICAL EXAMINERS, an agency of the State of Colorado; GENE E. BOLLES, M.D.; HENRY G. FIEGER, M.D.; NANCY GERLOCK; JACK KLAPPER, M.D.; STEPHEN R. KOSLOFF, M.D.; ROBERT LEDERER, M.D.; NELSON E. MOHLER, D.O.; FREDERICK R. PAQUETTE, M.D.; CHRISTINE A. PETERSEN, M.D.; RAY E. PIPER, D.O.; MOLLY SOMMERVILLE, ESQ.; BRUCE WILSON, M.D.; MICHAEL VITEK, each as individuals of that agency,

Defendants-Appellees.

No. 88-1129
(D.C. No. 87-F-941)
(D. Colo.)

Filed Jun 22 1989

ORDER AND JUDGMENT*

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before MOORE, SETH, and TACHA, Circuit Judges.

Lawrence Robertson, plaintiff, asks this court to review the district court's entry of summary judgment in favor of the defendants, the State Board of Medical Examiners of the State of Colorado and its members. Dr. Robertson contends that the district court erred in ruling that defendants were entitled to absolute immunity, that the eleventh amendment precluded suit against the defendants, and that the court was collaterally estopped from deciding the case due to a concurrent proceeding in the Colorado Court of Appeals. We affirm.

The members of the Colorado State Board of Medical Examiners (Board) are appointed by the governor under Colo. Rev. Stat. § 12-36-103 (1985). Dr. Robertson is a licensed physician practicing neurosurgery. The Board initiated disciplinary proceedings against Dr. Robertson for alleged improper record-keeping in connection with his medical practice. In August of 1982, Dr. Robertson entered into a stipulation and order with the Board under which he agreed to have his practice monitored. Among other things, the stipulation required a mutually satisfactory physician to monitor Dr. Robertson's practice for twenty-four months and to submit monthly reports to the Board. Dr. Robertson sent a notice to the Attorney General's office, indicating that he had arranged for a Dr. Boyd to monitor his practice. Apparently, the Attorney General's office never forwarded this notice to the Board. For nineteen months, Dr. Boyd monitored plaintiff's practice but failed to submit monthly reports.

In May of 1984, the Board served Dr. Robertson with a complaint for violation of the stipulation and with a summary suspension of his license for the alleged violation. Pursuant to Colo. Rev. Stat. § 12-36-118 (1985), an independent hearing officer conducted a hearing during which Dr. Robertson was represented by an attorney. The hearing officer recommended that the complaint against the plaintiff be dismissed because he found only a technical violation of the stipulation agreement in the monitoring physician's failure to file monthly reports. The Board thereafter rejected the hearing officer's recommendation, pursuant to power granted to it under Colo. Rev. Stat. § 12-36-118(1). It then issued a final order in March, 1985, sentencing Dr. Robertson to twenty-four additional months of monitoring by a physician specifically approved and interviewed by the Board, and further requiring the doctor to notify the Board of any surgical procedure he conducted for an additional thirty-six months. Plaintiff appealed this final decision to the Colorado Court of Appeals, which found the Board's decision was not arbitrary and capricious and affirmed the order.

Dr. Robertson brought this action in federal court, alleging that the defendants violated his constitutional right to procedural and substantive due process under 42 U.S.C. § 1983 (1982). Defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(5) as a responsive pleading, claiming that they were entitled to absolute immunity, that the federal courts did not have jurisdiction over them by virtue of their eleventh amendment immunity, and that the action was barred under the doctrine of collateral estoppel due to the concurrent appellate proceeding in state court.

Treating it as one for summary judgment, the district court granted defendants' motion. The district court first held that the recent Tenth Circuit case, *Horwitz v. State Board of Medical Examiners*, 822 F.2d 1508 (10th Cir.), *cert. denied*, 108 S.Ct. 453 (1987), was controlling precedent on the issue of absolute immunity. We agree. In *Horwitz*, we held that, as a matter of law, Board members are entitled to absolute immunity in connection with all official acts performed pursuant to their adjudicatory and prosecutorial functions created under state statute. *Id.* at 1515.

Dr. Robertson attempts to distinguish the *Horwitz* case on the grounds that there are factual differences in the type of violations with which the physicians in each case had been charged. In *Horwitz*, the charges involved improper medical practices which threatened public safety, while in the present case, Dr. Robertson was only charged with technical record-keeping violations. This argument is not persuasive because, regardless of the factual basis for the disciplinary action, the test with respect to immunity focuses on the nature of the functions performed by the administrative officials. Under our evaluation of the Board's functions, Board members serve in both an adjudicatory and prosecutorial role and are, therefore, entitled to absolute immunity from damages arising under 42 U.S.C. § 1983. *Id.* We see no distinction between the functions performed by the Board in *Horwitz* and in the present case. Dr. Robertson's complaint targeted the Board's rejection of the hearing officer's recommendations and its imposition of additional sanctions. Clearly the "functional comparability" of these actions is equivalent to the role of judicial officials who have absolute immunity. *Id.; see also Sellars v. Procunier,*

641 F.2d 1295, 1298 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981).

Dr. Robertson also argues that the district court erred in finding that the eleventh amendment bars his cause of action against the defendants. It has long been settled that the eleventh Amendment bars federal suits against a state by its own citizens. *Papasan v. Allain*, 478 U.S. 265, 276 (1986). The eleventh amendment immunity extends to arms of the state and state officials. *Mount Healthy School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). "In determining whether an agency is protected by the Eleventh Amendment, therefore, the critical inquiry is whether the entity 'is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.' " *Meade v. Grubbs*, 841 F.2d 1512, 1525 (10th Cir. 1988) (citation omitted). There is no question that the Board of Medical Examiners is an agency or arm of the state protected by the state's eleventh amendment immunity. *See* Colo. Rev. Stat. § 24-3-101 (1988) ("the term 'agency' means every agency in the executive branch of the state government which is required by . . . statutes of the state to exercise discretion or to perform judicial or quasi-judicial functions. As so qualified, the term "agency" includes . . . boards, commissions, departments, divisions, offices, and officers."); *id.* § 12-36-103 (1985).

Because we affirm the district court's ruling on both the common law immunity and the eleventh amendment immunity issues, we do not reach the remaining arguments raised on appeal. The judgment of the United

States District Court for the District of Colorado is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM

APPENDIX B

BEFORE THE STATE BOARD OF MEDICAL EXAMINERS

STATE OF COLORADO

STIPULATION AND ORDER

IN THE MATTER OF DISCIPLINARY PROCEEDING REGARDING THE LICENSE TO PRACTICE MEDICINE IN THE STATE OF COLORADO OF LAWRENCE M. ROBERTSON, JR., M.D.,

Respondent.

IT IS HEREBY STIPULATED by and between the Inquiry Panel of the Colorado State Board of Medical Examiners (hereinafter referred to as the "board") and Lawrence M.Robertson, Jr., M.D. (hereinafter referred to as "respondent") as follows:

WHEREAS, Lawrence M. Robertson, Jr., M.D. was licensed to practice medicine by the Colorado Medical Examiners on or about September 14, 1958; and

WHEREAS, the board has received from various sources multiple reports concerning the standard of practice being conducted by respondent which gave the board reasonable grounds to believe that respondent was involved in unprofessional conduct as defined by C.R.S. 1973, 12-36-117; and

WHEREAS, board has referred this matter to the attorney general for the preparation and filing of formal

charges for a disciplinary hearing before the Hearings Panel of the Colorado State Board of Medical Examiners pursuant to C.R.S. 1973, 12-36-118; and

WHEREAS, those formal charges allege, *inter alia*:

A. Respondent, in October and November, 1978 in his treatment of patient number 741517 at St. Joseph's Hospital in Denver failed to keep adequate hospital medical records, failed to obtain, perform and/or record in the hospital a history and physical concerning the patient, failed to take adequate precautions to protect the dura and the brain during surgery for removal of a metastatic tumor from the patient's skull, negligently or incompetently performed said surgery and failed to indicate in appropriate hospital records that a complication had occurred during said surgery, and

B. Respondent, in September and October, 1978 in his treatment of patient number 740021 at St. Joseph's Hospital in Denver failed to keep adequate hospital medical records concerning this patient, and

C. Respondent, from September through November, 1978 in his treatment of patient number 740110 at St. Joseph's Hospital in Denver failed to keep adequate hospital medical records, failed to obtain, perform and/or record in the hospital records an adequate history and physical concerning this patient, performed a surgical procedure known as a rhizotomy without adequate indications for said surgery noted in the patient's medical records, and negligently or incompetently performed said surgery, and

D. Respondent, in July and August, 1977 in his treatment of patient number 248214-9 at Lutheran Medical Center in Denver failed to see, examine and attend said patient in a timely manner, despite respondent having been informed that the patient was in the Intensive Care Unit and despite respondent having been informed of physical findings of said patient which required respondent's personal, timely and on-site assessment and treatment of said patient.

E. Respondent, in October, 1978 in his treatment of patient number 741518 at St. Joseph's Hospital in Denver failed to keep adequate hospital records and failed to obtain, perform and/or record in hospital records an adequate history and physical concerning this patient, and

F. Respondent in August, 1978 in his treatment of patient number 736972 at St. Joseph's Hospital in Denver performed an anterior interbody fusion unnecessarily and with inadequate indications for said surgery noted in the patient's hospital medical records.

G. Respondent in August and September, 1978 in his treatment of patient number 737155 at St. Joseph's hospital in Denver failed to keep adequate hospital records, failed to obtain, perform and/or record in hospital records an adequate history and physical concerning this patient, and performed unnecessary surgery for transposition of the left ulnar nerve or performed said surgery with inadequate indications for it recorded in the patient's hospital medical records.

H. Respondent in July, 1975 engaged in unprofessional conduct in his treatment of patient number 004311

at Aurora Community Hospital by lacerating the right iliac artery and inferior vena cava while performing a lumbar laminectomy and failing to recognize said complication for an extended period of time following said surgery and failing to take necessary and appropriate steps to correct, repair, or alleviate the above-described complication within a reasonable period of time and,

I. respondent, in August, 1975 in his treatment of patient number 446138 at Presbyterian Hospital in Denver was negligent in one or more of the following ways:

1. Respondent performed a ventricular jugular shunt revision on August 15, 1975 which was not indicated or necessary and which produced hemorrhage resulting in injury and damage to the patient;

2. Respondent failed to diagnose or adequately treat the interventricular hemorrhage or resulting hematoma;

3. On August 23 and 24, 1975, respondent deserted said patient;

4. Respondent technically mismanaged the case and,

J. Respondent, from November, 1974 through March, 1975 in his treatment of patient number 639912 at St. Joseph's Hospital, Denver (also known by patient numbers 436061 and 436764 at Aurora Presbyterian Hospital) performed three separate lumbar, surgical procedures on said patient within a period of approximately four months one or more of which were performed at the wrong level, performed one or more of these surgeries

were performed unnecessarily or without adequate indication, negligently or incompetently performed one or more of the above-described surgeries, failed to recognize that one or more of respondent's surgical procedures on said patient had been performed at the wrong level and to adjust respondent's subsequent surgical actions and decisions accordingly and failed to maintain adequate hospital medical records concerning said patient and such actions of respondent constitute grossly negligent malpractice and,

WHEREAS, counsel for respondent and counsel for the board have discussed all issues raised by the above-described pleadings and respondent's response thereto and it is the intent and purpose of this stipulation to provide for compromise an settlement of all such issues without the necessity of proceeding to a formal disciplinary hearing; and

WHEREAS, the board has the statutory responsibility and obligation to protect the public health, safety and welfare as set forth in this Medical Practice Act, C.R.S. 1973, 12-36-101 *et seq.;*

NOW THEREFORE, the following stipulation is entered into and respectfully submitted for the purpose of allowing its terms to become the order of the state Board of Medical Examiners.

IT IS STIPULATED AND AGREED AS FOLLOWS:

1. The board has jurisdiction over the person of respondent and the subject matter contained herein.

2. Respondent was licensed to practice medicine in the State of Colorado on or about September 14, 1958 and has been continuously licensed since that date.

3. Respondent and board specifically agree that all charges contained in the formal complaint are currently pending against respondent and a prompt hearing on this matter has been set for August 17, 1982 before a hearing officer of the State of Colorado and the board.

4. Respondent and board specifically agree that each of the numbered paragraphs under counts I, II, III, IV and V of said formal complaint are charged as a violation of the Medical Practice Act, C.R.S. 1973, 12-36-117, as against respondent, Lawrence M. Robertson, Jr., M.D.

5. Respondent and board specifically agree that upon proof of any one of said multiple counts involving the charges pending against respondent, respondent would be subject to disciplinary proceeding which include all penalties as contemplated under the Medical Practice Act.

6. Respondent and board specifically agree that there is a *prima facie* evidence which, if unrebutted, would sustain a finding of a violation or violations of the Medical Practice Act by respondent under counts I, II, III, IV or V.

7. Respondent agrees to enter into this stipulation because he does not wish to contest the allegations against him at a formal hearing, because he has an adverse jury verdict in one malpractice case, because he has settled another malpractice case, because respondent

admits irregularities in recordkeeping. Respondent does not admit the other charges in the formal complaint of the attorney general.

8. Respondent agrees to undergo at his own expense a psychiatric evaluation performed by a psychiatrist approved by the board and to follow the course of treatment and counseling recommended by said psychiatrist until respondent can demonstrate to the board that such treatment and counseling is unnecessary. Respondent will insure that the psychiatrist's written report will be made available to the board within 30 days of the signing of this stipulation. Reports of any treatment must be made to the board quarterly in writing.

9. Respondent agrees to notify the board in writing of the date on which respondent will commence the practice of surgery.

10. Respondent agrees to obtain a preoperative consultation prior to performing any surgery in which consultation the consulting physician concurs that the surgery is indicated. The provisions of this paragraph 10 are effective for 36 months next following the date on which respondent commences the practice of surgery.

11. Respondent agrees to obtain monitoring of his surgical procedures in the operating room with another surgeon privileged to do the procedure in attendance and assisting throughout the procedure. The provisions of this paragraph 11 are effective for 36 months next following the date on which respondent commences the practice of surgery.

12. Respondent agrees and the board herein finds and orders that the practice of respondent shall be monitored and/or audited once a month for a period covering the next thirty-six (36) months from the date of this stipulation by a licensed physician or physicians mutually acceptable to respondent and the board. Said physician or physicians shall report to the board on a monthly basis with the reports due to the board within fourteen (14) days of each monthly audit. Said reports shall fully describe the type of audit conducted, detail the findings of such audit, shall specifically address the appropriateness of respondent's response to patient's complaints including respondent's recordkeeping of same and where appropriate, make specific recommendations regarding respondent's practice. Said report shall specifically address any case by name where it is the opinion of the reporting physician or physicians that the actions or inactions of respondent represent substandard care or gross negligence.

13. Respondent agrees to attend fifty (50) hours of category I continuing medical education in neurology and general medicine each year for the next three years.

14. Respondent is fully aware and understands his right to a formal disciplinary hearing pursuant to C.R.S. 1973, 12-36-118 and hereby voluntarily waives those rights and requests that this stipulation be accepted by the board with the same force and effect as an order entered as a result of a formal disciplinary hearing entered as a result of a formal hearing pursuant to C.R.S. 1973, 12-36-118, as amended.

15. The attorney general and board agree to dismiss all counts of the formal complaint in this matter. Further, the parties hereto agree that the date originally set for the hearing of this matter, August 17, 1982, be vacated.

16. Respondent agrees not to practice medicine in the state of Colorado except in compliance with this stipulation.

17. In the event any report submitted concerning any portion of this stipulation indicates a violation of one of the terms and conditions on the part of respondent, respondent shall be deemed to be not in compliance with the terms of his probation and the board, in its own discretion, may summarily suspend respondent's license to practice medicine in the state of Colorado. If at a subsequent hearing the specific violation of this stipulation is established, respondent's license to practice may be revoked. This stipulation may be entered into evidence at said hearing.

18. In the event an alleged violation of this stipulation is taken to a hearing and the facts which constitute that violation are determined to be not proven, no disciplinary action shall be taken by board and this stipulation previously entered into by board and respondent shall remain in full force and effect.

19. This stipulation and order shall take effect on the date on which it is approved by the board. All time periods run only while respondent is actively engaged in the practice of medicine in Colorado or as an active member of the Armed Forces of the United States.

20. This stipulation and order is a public record in the custody of the board.

Dated this 9th day of August, 1982.

/s/ Alex Stephen Keller
LAWERENCE M.
ROBERTSON, JR., M.D.
Respondent

/s/ Alex S Keller
ALEX STEPHEN KELLER
Attorney for Respondent

/s/ Ray E. Piper, D.O.
COLORADO STATE
BOARD OF MEDICAL
EXAMINERS

FOR THE ATTORNEY
GENERAL

/s/ Edward L. Arcuri
EDWARD L. ARCURI, 3023
Assistant Attorney General
Regulatory Law Section

Attorneys for State
of Colorado

1525 Sherman Street,
3d Floor
Denver, Colorado 80203
Telephone: 866-3611
AG Alpha No. RG ME
DAAQS
AG File No.
CRL8202317/DS

September 9, 1982

Edward L. Arcuri, Esq.
Assistant Attorney General
1525 Sherman Street
Denver, CO 80203

Re: Lawrence M. Robertson, Jr., M.D.

Dear Ed:

I am enclosing the original and two copies of the Stipulation and Order that our office picked up. It is my understanding that you had a conversation with Mr. Johnson of my office on Friday. It is also my understanding that Dr. Robertson executed the Stipulation and Order with the following understandings that will be approved by you and the Colorado State Board of Medical Examiners:

1. As to paragraph 8 on page 5: Mr. Johnson and you reached the agreement that the language that relates to the psychiatric report to be submitted within 30 days is to be interpreted to mean that Dr. Robertson will do everything in his power to facilitate the delivery of the report to you within 30 days, but that if the examining doctor does not submit the report within that time, the acts of the doctor will not be interpreted adversely against Dr. Robertson. The only act that would be considered adversely to Dr. Robertson is if he does something to delay the submission of the report.

2. As to paragraph 12 on page 5: You and Mr. Johnson agreed that the words "privileged to do the procedure" means that the doctor in attendance with Dr. Robertson shall have hospital privileges for the hospital in which the surgical procedure is performed and that the

doctor in attendance will be a surgeon qualified to perform the procedure Dr. Robertson is performing. In cases of medical emergency or when Dr. Robertson is acting pursuant to direct military order this provision shall not obtain.

3. As to paragraph 19 on page 7: Mr. Johnson and you have agreed that if a direct order causes Dr. Robertson to be unable to comply with the terms of this Stipulation, that said action, pursuant to a direct order of the military, will not be construed as an abrogation of this agreement nor a ground for revocation of his license.

If the above are not the agreements between you, the Board, our office and our client, please notify me immediately. If they are in fact our agreement, please signify by having a representative of the Board affix his signature in the space provided, as well as your affixing your signature and return a signed copy to us. It is also my understanding that the above will be incorporated by action of the Board into the Stipulation and Order that we are forwarding to you. Also, we would like a signed copy of the Stipulation and Order when that is accomplished.

Yours very truly,

/s/ Alex Stephen Keller
ALEX STEPHEN KELLER

Enclosure
cc: Lawrence M. Robertson, Jr., M.D.

We have read the foregoing and agree with all terms thereof and the same are made part of the Stipulation and Order entered into between these parties.

/s/ Ray E. Piper, D.O.
COLORADO STATE BOARD
OF MEDICAL EXAMINERS

/s/ Edward L. Arcuri
EDWARD L. ARCURI 3023
Assistant Attorney General
Regulatory Law Section
Attorneys for the State of
Colorado
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
866-3611
AG Alpha No. RG ME DAAQS
AG File No. CRL8202317/DS

APPENDIX C

DONALD A. JOHNSTON, M.D.
3535 CHERRY CREEK NORTH DRIVE
SUITE 308
DENVER, COLORADO 80209
(303) 399-9701

October 27, 1982

Colorado State Board of Medical Examiners
1525 Sherman Street, Room 132
Denver, CO 80203

Re: Lawrence M. Robertson, M.D.

Dear Sirs:

With the agreement of the Board of Medical Examiners, Mr. Alex Keller contacted me in behalf of his client, Dr. Robertson, to arrange a psychiatric evaluation regarding the doctor's emotional ability to practice medicine. I saw Dr. Robertson for three clinical interviews on September 28, October 7, and October 8, 1982.

As a result of my evaluation of Dr. Robertson, I see no evidence of any emotional or psychological disorder that would impair his judgment or medical ability precluding his continuation of the practice of medicine.

We reviewed the circumstances of his life, especially events in 1979 to the present, that have caused him professional problems, financial difficulties, and emotional pain. Despite all that has occurred, he has come through it without being depressed or disturbed. He is optimistic and enthusiastic about his future be it either medical practice, law, or a combination of both.

At present, he has retained his license to practice but has no hospital or surgical privileges. He is seeing some office patients and devotes most of his time to law school.

He is oriented in all spheres, intelligent, well organized, coherent and rational. His mood is even. He speaks of having been angry about being deprived of due process in the loss of hospital privileges, but says that the episode is behind him now. His thinking is clear and his judgment is unimpaired.

In the event of further questions, please do not hesitate to call me.

Sincerely,

/s/ Donald A. Johnston
Donald A. Johnston, M.D.

APPENDIX D

BEFORE THE STATE BOARD
OF MEDICAL EXAMINERS

STATE OF COLORADO

Proceeding No._____

ORDER OF SUMMARY SUSPENSION

IN THE MATTER OF DISCIPLINARY PROCEEDINGS REGARDING THE LICENSE TO PRACTICE MEDICINE IN THE STATE OF COLORADO OF LAWRENCE M. ROBERTSON, JR., M.D.,

Respondent.

TO: Lawrence M. Robertson, Jr., M.D.
1635 Gilpin St.
P.O. Box 18126
Denver, CO 80218

THIS MATTER having come before inquiry panel A of the Colorado State Board of Medical Examiners (hereinafter "panel"), and the panel having reviewed its entire file in this matter and being otherwise fully advised in the premises, DOES FIND AS FOLLOWS:

1. Respondent was licensed by the Board of Medical Examiners of the State of Colorado (hereinafter "board"), to practice medicine within the State of Colorado on September 14, 1958, and has been continuously licensed since that time.

2. The panel, by virtue of respondent's licensure, has jurisdiction over respondent and over the subject matter of this proceeding.

3. On August 9, 1982, respondent entered into a stipulation and order with the board, a copy of which is attached hereto as exhibit A. The August 9, 1982 stipulation and order reads in pertinent part as follows:

> 9. Respondent agrees to notify the board in writing of the date on which respondent will commence the practice of surgery.
>
> . . . .
>
> 12. Respondent agrees and the board herein finds and orders that the practice of respondent shall be monitored and/or audited once a month for a period covering the next thirty-six (36) months from the date of this stipulation by a licensed physician or physicians mutually acceptable to respondent and the board. Said physician or physicians shall report to the board on a monthly basis with the reports due to the board within fourteen (14) days of each monthly audit. Said reports shall fully describe the type of audit conducted, detail the findings of such audit, shall specifically address the appropriateness of respondent's response to patient's complaints including respondent's recordkeeping of same and where appropriate, make specific recommendations regarding respondent's practice. Said report shall specifically address any case by name where it is the opinion of the reporting physician or physicians that the actions or inactions of respondent represent substandard care or gross negligence.
>
> 13. Respondent agrees to attend fifty (50) hours of category I continuing medical education in neurology and general medicine each year for the next three years.
>
> . . . .

> 16. Respondent agrees not to practice medicine in the state of Colorado except in compliance with this stipulation.

4. The panel received a report containing the following information: Without notifying the board in advance respondent performed surgery on March 22, 1984. A copy of the belated notification is attached hereto as exhibit B and is incorporated herein by reference.

5. Since entering the August 9, 1982 stipulation and order, respondent has maintained an active office practice treating approximately 25 to 30 patients a month for neurological complaints.

6. Respondent has failed to be monitored and/or audited by a physician mutually acceptable to respondent and the board has failed to provide the board reports required by the August 9, 1982 stipulation and order, has failed to obtain continuing education, and consequently has practiced medicine in the State of Colorado without complying with the August 9, 1982 stipulation and order.

7. The August 9, 1982 stipulation and order expressly provides that the board may summarily suspend respondent's license in accordance with paragraph 17 of that stipulation and order. Paragraph 17 reads:

> 17. In the event any report submitted concerning any portion of this stipulation indicates a violation of one of the terms and conditions on the part of respondent, respondent shall be deemed to be not in compliance with the terms of his probation and the board, in its own discretion, may summarily suspend respondent's license to practice medicine in the state of Colorado. If at a subsequent hearing the specific violation of this stipulation is established,

respondent's license to practice may be revoked. This stipulation may be entered into evidence at said hearing.

8. The panel specifically finds that it has reasonable grounds to believe that respondent is guilty of deliberate and willful violation of the August 9, 1982 stipulation and order and that such a violation constitutes such a threat to any present and future patients of respondent, and thus to the public health, safety and welfare, as to imperatively require emergency action, to wit, the summary suspension of respondent's medical license pending disciplinary proceedings as authorized by section 24-4-104(4), C.R.S. (1973).

9. The panel specifically finds, in its own discretion pursuant to paragraph 17 of the August 9, 1982 stipulation and order that respondent has not complied with the terms of his probation and that such conduct warrants summary suspension of respondent's license to practice medicine pending disciplinary proceedings.

THEREFORE, IT IS HEREBY ORDERED that the license of Lawrence M. Robertson, Jr., M.D. to practice medicine in the State of Colorado be hereby summarily suspended pending a final determination of whether respondent's license to practice medicine in the State of Colorado should be suspended or revoked pursuant to the provisions of section 12-36-118(5)(b), C.R.S. (1982).

And pending the outcome of said proceedings, IT IS HEREBY FURTHER ORDERED, that Lawrence M. Robertson, Jr., M.D. cease, desist, and refrain from any further acts for which a license to practice medicine is required by the laws of the State of Colorado.

DATED this 26th day of June, 1984.

COLORADO STATE BOARD
OF MEDICAL EXAMINERS
Inquiry Panel A

/s/ Ray E. Piper, D.O.
RAY E. PIPER, D.O.

APPENDIX E

STATE OF COLORADO

Department of Regulatory Agencies
Wellington E. Webb
Executive Direction

Seal

Division of Registrations
Bruce M. Douglas, Director

Richard D. Lamb
Governor

BOARD OF MEDICAL EXAMINERS
Thomas J. Beckett
Program Administrator

BEORE THE STATE BOARD
OF MEDICAL EXAMINERS
STATE OF COLORADO

INITIAL DECISION

IN THE MATTER OF DISCIPLINARY PROCEEDINGS REGARDING THE LICENSE TO PRACTICE MEDICINE IN THE STATE OF COLORADO OF LAWRENCE M. ROBERTSON, JR. M.D.

CERTIFICATE OF MAILING

I hereby certify that I have mailed a true and correct copy of the INITIAL DECISION to Alex S. Keller, 950 17th Street, Suite 935, Denver Colorado 80202; to Lawrence M. Robertson, Jr., M.D., 1635 Gilpin, Denver, CO 80218, by depositing same in the U.S. Mail, postage prepaid, in Denver, Colorado; to Dave Burlage, Assistant Attorney General, 2nd Floor, 1525 Sherman Street, Denver, Colorado 80203, via Interagency Mail, on this 7th day of November, 1984.

/s/ Gail L. Tanaus
Secretary to the Board

RECEIVED
NOV - 9 1984

COLORADO
NEUROSURGERY P.C.

BEFORE THE STATE BOARD
OF MEDICAL EXAMINERS
STATE OF COLORADO

INITIAL DECISION

IN THE MATTER OF DISCIPLINARY PROCEEDINGS REGARDING THE LICENSE TO PRACTICE MEDICINE IN THE STATE OF COLORADO OF LAWRENCE M. ROBERTSON, JR., M.D.

This matter was heard in Denver, Colorado, before Don P. Stimmel, Hearing Officer, State Department of Administration, on September 17 and 18, 1984. The inquiry panel of the State Board of Medical Examiners was represented by Lynn L. Palma, Assistant Attorney General; the respondent, Dr. Lawrence M. Robertson, Jr., was represented by Alex Steven Keller, of Keller and Dunievitz, P.C., Attorneys at Law. Dr. Chester M. Anderson, Dr. Harry R. Boyd, Dr. Lawrence M. Robertson, Jr., and Dr. Donald A. Johnston were sworn and testified as witnesses. Counsel stipulated as to the testimony of Edward Arcuri in lieu of calling him back from another

city when he had appeared but insufficient time was available for his testimony on the first day of hearing. Board Exhibits 30 through 49, inclusive, 53, 54, and portions of Exhibit 51, and respondent's Exhibits A, C, H, W, and portions of Exhibits O and P were admitted into evidence, some for all purposes and some for limited purposes, and some without objection and some over objection. The Hearing Officer on review of all exhibits determined that respondent's Exhibits D, E, F, I and M were all duplicative of Exhibits identified by number as Board Exhibits and those Exhibits are therefore not listed as admitted. Board Exhibits 1 through 29, inclusive, 56 and 57 were offered and rejected at the time of the hearing. The Hearing Officer on review of all documents determined that although Exhibit 51 was stipulated into evidence, portions related to meetings and events prior to August 9, 1982. The Hearing Officer excluded 1 through 29 on that basis, and therefore the Hearing Officer disregarded and treated as excluded those portions of Exhibit 51 relating to meetings prior to August 9, 1982. The Hearing Officer also took official notice of certain portions of the Physician's Desk Reference. Reference was made in the hearing to patients, except any who may have waived the physician-patient privilege, by numbers assigned to the patient and the patient's records during the hearing, so as to protect their privacy and the confidentiality of their records.

In the text of this decision, Dr. Lawrence M. Robertson, Jr., is referred to by name or as the "respondent"; the State Board of Medical Examiners is referred to as the "Board"; Inquiry Panel A of the Board is referred to as the "IP"; the Hearing Panel of the Board is referred to as the

"HP"; the Colorado Medical Practice Act, Article 36 of Title 12, C.R.S. is referred to as the "Act"; the Colorado Administrative Procedure Act, Article 4 of Title 24, C.R.S. is referred to as the "APA"; that certain stipulation and order entered between respondent and the Board under the date of August 9, 1982 is referred to as the "stipulation"; the Physician's Desk Reference is referred to as the "PDR"; drugs or medications to which reference is made are referred to by their trade or brand name.

NATURE OF THE CASE

This is a disciplinary proceeding against respondent license based upon alleged violations of the stipulation.

PRELIMINARY MOTIONS AND RULINGS

The Hearing Officer ruled prior to the hearing that the issues related solely to whether or not respondent had violated the stipulation, that his alleged conduct and standard of practice prior to entry into the stipulation was not at issue, and that therefore evidence relating to such practice or conduct would be excluded. This is the principal basis for exclusion of Exhibits 1 through 29, 56, 57 and so much of Exhibit 51 as related to Board proceedings prior to the date of the stipulation. The Hearing Officer granted a motion to quash the subpoena issued to Jack A. Klapper, M.D., a member of the IP, and excluded all evidence relating to the alleged motives of the board, the IP or individual members thereof in bringing this proceeding. The Hearing Officer also excluded evidence of alleged financial losses suffered by respondent between June 26, 1984 and the date of hearing and of

alleged inconsistent statements made by respondent concerning matters which are not at issue in this hearing. Both parties submitted written offers of proof relating to all such matters, and the Hearing Officer rejected those offers. The Hearing Officer continues to believe that the rulings above-described were correct, and they are hereby reaffirmed. Other preliminary or evidentiary rulings need not be repeated here.

FINDINGS OF FACT

Respondent was licensed to practice by the Board on or about September 14, 1958. He subsequently developed specialties of neurology and neurosurgery, and practiced in those fields continually until the time of the stipulation. He continued to practice as a neurologist between the time of the stipulation and the summary suspension entered in connection with this matter.

During the latter 1970's the Board received a series of complaints concerning the standard of respondent's practice and record keeping. These complaints were investigated and eventually led to the filing of a formal complaint by the IP in October, 1980. The formal complaint alleged violations of the Act in connection with the treatment of ten different patients. Extensive negotiations followed. The parties entered the stipulation under date of August 9, 1982, eight days prior to the scheduled commencement of the hearing on the formal complaint. The stipulation included the following specific language relating to the charges and their pendency:

> 4. Respondent and board specifically agree that each of the numbered paragraphs under

Counts I, II, III, IV AND V of said formal complaint are charged as a violation of the Medical Practice Act, C.R.S. 1973, 12-36-117, as against respondent, Lawrence M. Robertson, Jr.

5. Respondent and board specifically agree that upon proof of any one of said multiple counts involving the charges pending against respondent, respondent would be subject to disciplinary proceeding which include all penalties as contemplated under the Medical Practice Act.

6. Respondent and board specifically agreed that there is a *prima facie* evidence (sic) which, if unrebutted, would sustain a finding of a violation or violations of the Medical Practice Act by respondent under Counts I, II, III, IV and V.

7. Respondent agrees to enter into this stipulation because he does not wish to contest the allegations against him at a formal hearing, because he has an adverse jury verdict in one malpractice case, because he has settled another malpractice case and because respondent admits irregularities in recordkeeping. Respondent does not admit the other charges in the formal complaint of the attorney general.

In the next paragraph of the agreement, respondent agreed to undergo psychiatric examination and to follow whatever course of treatment and counseling was recommended by the psychiatrist. Subsequently, respondent's counsel proposed and the Board accepted Dr. Johnston as the psychiatrist to perform the evaluation. His report concluded that respondent, while angry, was emotionally and psychologically able to practice medicine. Dr. Johnston did not explore, nor did the report address, any reasons for any of the alleged acts of substandard practice by respondent.

Respondent also agreed to have his practice monitored for 36 months after the date of the stipulation. Paragraph 12 of the stipulation specifically reads as follows:

> Respondents agrees and the board herein finds and orders that the practice of respondent shall be monitored and/or audited once a month for a period covering the next thirty-six (36) months from the date of this stipulation by a licensed physician or physicians mutually acceptable to respondent and the board. Said physician or physicians shall report to the board on a monthly basis with the reports due to the board within fourteen (14) days of each monthly audit. Said reports shall fully describe the type of audit conducted, detail the findings of such audit, shall specifically address the appropriateness of respondent's response to patients' complaints including respondent's recordkeeping of same and where appropriate, make specific recommendations regarding respondent's practice. Said report shall specifically address any case by name where it is the opinion of the reporting physician or physicians that the actions or inactions of respondent represent substandard care or gross negligence.

Respondent also agreed to have his surgical practice monitored. Paragraphs 9, 10 and 11 of the stipulations specifically state as follows:

> 9. Respondent agrees to notify the board in writing of the date on which respondent will commence the practice of surgery.
>
> 10. Respondent agrees to obtain a preoperative consultation prior to performing any surgery in which consultation the consulting physician concurs that the surgery is indicated. The provisions of this paragraph 10 are effective for 36

months next following the date on which respondent commences the practice of surgery.

11. Respondent agrees to obtain monitoring of his surgical procedures in the operating room with another surgeon privileged to do the procedure in attendance and assisting throughout the procedure. The provisions of this paragraph 11 are effective for 36 months next following the date on which respondent commences the practice of surgery.

Respondent also agreed to attend 50 hours of continued medical education courses in neurology and general medicine each year over the next three years.

The consequences of the stipulation were addressed in subsequent paragraphs, as follows:

14. Respondent is fully aware and understands his right to a formal disciplinary hearing pursuant to C.R.S. 1973, 12-36-118 and hereby voluntarily waives those rights and requests that this stipulation be accepted by the board with the same force and effect as an order entered as a result of a formal disciplinary hearing entered as a result of a formal hearing pursuant to C.R.S. 1973, 12-36-118, as amended.

15. The attorney general and board agree to dismiss all counts of the formal complaint in this matter. Further, the parties agree that the date originally set for the hearing of this matter, August 17, 1982 be vacated.

16. Respondents agrees not to practice medicine in the state of Colorado except in compliance with this stipulation.

17. In the event any report submitted concerning any portion of this stipulation indicates a violation of one of the terms and conditions on the part of respondent, respondent shall be

> deemed to be not in compliance with the terms of his probation and the board, in its own discretion, may summarily suspend respondent's license to practice medicine in the state of Colorado. If at a subsequent hearing the specific violation of this stipulation is established, respondent's license to practice may be revoked. This stipulation may be entered into evidence at such hearing.
>
> 18. In the event an alleged violation of this stipulation is taken to a hearing and the facts which constitute that violation are determined to be not proven, no disciplinary action shall be taken by board and this stipulation previously entered into by board and respondent shall remain in full force and effect.

Subsequent conversations to clarify portions of the stipulation were held between Mr. Arcuri, then the Assistant Attorney General representing the IP, and Mr. Keller, respondent's counsel. Under date of September 9, 1982, the stipulation was supplemented by a letter from Mr. Keller from Mr. Arcuri signed by Mr. Arcuri and Dr. Ray E. Piper, D.O., on behalf of the Board below language acknowledging agreement to its terms and agreement to make those terms part of the stipulation. That letter stated in pertinent part as follows:

> It is also my understanding that Dr. Robertson executed the Stipulation and Order with the following understandings that will be approved by you and the Colorado State Board of Medical Examiners. . . .
>
> 2. As to paragraph 12 (sic) on page 5: You and Mr. Johnson agreed that the words 'privileged to do the procedure' means that the doctor in attendance with Dr. Robertson shall have hospital privileges for the hospital which the surgical

> procedure is performed and that the doctor in attendance will be a surgeon qualified to perform the procedure Dr. Robertson is performing. In cases of medical emergency or when Dr. Robertson is acting pursuant to direct military order this provision shall not obtain.

From the context, it is obvious the parties agreed, and the Hearing Officer specifically finds, that the reference to paragraph 12 was really to paragraph 11.

After entering the stipulation, respondent contacted Dr. Boyd and asked him to serve as monitor for respondent's practice. Dr. Boyd is a Board certified and highly respected neurosurgeon practicing in Denver who has known Dr. Robertson for many years. Dr. Boyd subsequently examined at least one of the patients referenced in the formal compliant, and issued a report critical of respondent's practice. The parties to this proceeding stipulated that Dr. Boyd was qualified by education and background to monitor respondent's practice, and that there is nothing in his education or background, nor connected with his acquaintanceship with respondent, which would have disqualified him from acting as a monitor.

Respondent explained to Dr. Boyd that he had reached an agreement with the Board and needed someone to monitor his practice by looking at his charts. He did not show Dr. Boyd a copy of the stipulation, nor tell Dr. Boyd that he would have to make periodic reports to the Board, nor ask Dr. Boyd to contact the Board. Dr. Boyd did not see the stipulation before late June or early July, 1984, and did not know that it provided for the making of periodic reports to the Board.

After Dr. Boyd agreed to monitor respondent's charts, respondent sent a letter to this effect to his attorney. At the time, it was standard Board practice to interview potential monitors of the practice of physicians under stipulation prior to approving them. This practice was intended both to satisfy the Board as to the qualifications and commitment of the monitoring physician, and to inform the monitoring physician of his duties. Arcuri, as counsel for the Board, was well aware of this procedure and was also aware that he lacked authority to agree to a monitor without the approval of the Board. He did not inform Mr. Keller of this procedure because he believed Mr. Keller already knew of it. Arcuri did not, and believed he could not, approve Dr. Boyd as a monitoring physician. He cannot recall clearly whether the name of Boyd came up in conversations concerning the matter.

After Dr. Boyd agreed to serve as monitoring physician, respondent so informed his counsel in a letter. There is no evidence that this letter was forwarded to office of the Attorney General. The Hearing Officer finds from circumstantial evidence that respondent through counsel, did notify counsel for the Board that he had obtained the services of Dr. Boyd as a monitoring physician. The Hearing Officer further finds that Dr. Boyd never appeared before or was interviewed by the Board or either panel of it, concerning his acceptability as a monitor for respondent, nor was he made aware that such an appearance was required by the Board.

Beginning late in the fall of 1982 and, continuing for all of 1983 and the first half of 1984, respondent periodically sent copies of the charts on his patients to Dr.

Boyd. Dr. Boyd reviewed all of these charts and found no indication of any substandard practice or substandard record keeping. If Dr. Boyd had found anything in review of the charts of respondent which indicated questionable practice in his view, he would have first contacted respondent. If the incident was serious enough or if respondent failed to provide an adequate response, Dr. Boyd would then have contacted the Board. Dr. Boyd acknowledged that some of the charts showed prescription of some medications for which the PDR has warnings or as to which the PDR recommends that tests be conducted prior to prescription. These medications specifically include Tegretol, Dilantin, Dekapene and Lithium. Dr. Boyd further testified that he has prescribed these medications to his own patients over a long period of time without performing the tests indicated and has never encountered any problems. None of the charts of patients to whom any of these medications were prescribed* showed any complications or damage as a result of any of the prescriptions. The charts did show that in some instances respondent discontinued the drug if it was not effective of if the patient suffered any temporary adverse reaction. Dr. Boyd also testified that the PDR is published at the instance of drug manufacturers and in his opinion suggests some tests and contains some warnings in excess of those necessary in order to protect the manufacturers from liability.

The records of treatment of eight patients were presented in evidence and the Hearing Officer reviewed them. All of those charts facially showed thoroughness in

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* *I.e.*, the charts introduced in evidence. Counsel for the IP had copies of all charts in her possession.

the taking of a thorough history on the patient, and did not show any obvious omissions. There is no basis in the evidence to believe that respondent submitted to Dr. Boyd anything less than charts complete to the date of submission of all patients whom he had treated during the period between the time of submission and the time of previous submission. Exhibit O, which consists of the chart submitted to Dr. Boyd, is approximately two inches thick, and included records for 98 patients including 358 office visits subsequent to August 9, 1982.

The preponderance of the evidence demonstrates that Dr. Boyd did thoroughly and conscientiously monitor the records of practice of respondent based upon respondent's charts. He did not conduct any independent investigation of respondent's office practice. He did not make reports to the Board concerning his monitoring of respondent's office practice. Respondent submitted the charts to Dr. Boyd periodically, but not monthly.

Dr. Anderson is Director of the Dry Creek Clinic in Arvada. That clinic includes a room for surgical procedures, which do not in the opinion of the treating physicians require that the patient be hospitalized or placed in a surgery center. Respondent and Dr. Anderson had been acquaintances for a long period of time. During late February or early March, 1984, respondent told Dr. Anderson that he was contemplating getting back into surgery and might from time to time wish to use the room at the Dry Creek Clinic available for that purpose. Dr. Anderson said that that would be agreeable.

On March 21, 1984, respondent saw William West, a patient and long time acquaintance. Mr. West does outdoor work and spends considerable time in the sun wearing no shirt. In the course of examining Mr. West concerning another complaint, respondent observed a papillioma (lesion) on the patient's right shoulder. Respondent was concerned that the lesion could be a melanoma, a rapid-spreading, malignant and usually fatal form of cancer. It was impossible to tell from outward appearance whether it was a melanoma or not, or whether it was malignant or not. Respondent regarded removal of the papilloma as a matter of some urgency because of its potential seriousness. That afternoon, he called Dr. Anderson and arranged for use of the Dry Creek Clinic surgery room the next day.

On March 22, 1984, respondent met West and Dr. Anderson at the Dry Creek Clinic. He asked Dr. Anderson to look at the papilloma, and Dr. Anderson agreed that it should be removed. Subsequently, with a nurse in attendance, respondent applied a local anesthetic (xylocaine) and removed the lesion. After seeing to other patients, Dr. Anderson stopped in the room again. He did observe the closing of the wound and application of the dressing. He had not returned to the room at that time to observe or assist specifically. He was waiting to use the room himself.

After performing the papillectomy, respondent sent the removed lesion to a laboratory for analysis The laboratory report was issued under date of March 27, 1984, and diagnosed the lesion as a basal cell carcinoma. This is a form of cancer but is not rapidly spreading and is far less serious than melanoma.

After receiving the laboratory report, respondent submitted a copy of his report of the surgery and of the laboratory report to his attorney. On May 8, 1984, Mr. Keller forwarded copies of the report to the Attorney General's office with a cover letter containing the following language:

> I notice from the Stipulation of August 9, 1982 between Dr. Robertson and the Colorado State Board of Medical Examiners pursuant to paragraphs 9 and 10 on page 5 of the stipulation, that your office should be notified at the time that Dr. Robertson commences the practice of surgery properly monitored with another physician in attendance. I enclose for your information a two page document regarding patient West in which surgery was performed on March 22, 1984. I thought you should have this report for your information.

The report of the surgery includes a recitation that Dr. Anderson was in attendance.

Doland's Medical Dictionary defines "surgery" *inter alia:*

> That branch of medicine which treats disease, wholly or in part, by manual and operative procedures.

The parties acknowledge that by common understanding, the term "surgery" in the broad sense includes all procedures where an incision is made into the body for the purpose of removal, repair or alteration of portions of the body or growth or objects from it or on its surface.

On or about May 2, 1984, slightly less than one week before the copy of the operative report was mailed to the

Board, respondent gave a deposition in a medical malpractice case in which he was an expert witness called by one of the parties. Included in the testimony at the deposition was a statement that he has an active practice, seeing 25 to 30 patients per month.

The psychiatric reports from Dr. Johnston, dated October 27, 1982, included a statement that respondent was seeing some office patients.

It is undisputed that respondent did not notify the Board prior to performing the papillectomy upon Mr. West on March 22, 1984.

At its regular meeting on June 7, 1984, the IP directed filing of the formal complaint here involved, alleging that respondent had violated paragraphs 9, 10, 11 and 12, and summary suspension of respondent's license, based on paragraph 17 of the stipulation. The formal complaint also alleged a violation of the condition concerning continuing medical education. That allegation has been withdrawn and is not at issue here. Respondent did notify the Board directly on May 31 and June 24, 1983, of his completion of continuing medical education courses.

The order of summary suspension and issuance of the formal complaint occurred on June 26, 1984. Respondent has not practiced medicine in Colorado since that time. At a setting conference held shortly after issuance of the summary suspension, counsel for respondent acquiesced in setting of the case for the dates on which it was heard.

CONCLUSION OF LAW

The stipulation by its own terms clearly acknowledges the Board's authority to act in case of alleged violation. The Act, at C.R.S. § 12-36-117, extensively defines "unprofessional conduct." This definition does not specifically include violation of a stipulation or order of the Board. The following section, 12-36-118, extensively describes disciplinary procedures and does not specify the grounds for disciplinary action. It is established by case law, however, that grounds for discipline are generally defined as those matters which constitute "unprofessional conduct" as defined in § 12-36-117. *E.g., Colorado State Board of Medical Examiners v. Jorgenson,* 198 Colo. 275, 599 P.2d 869 (1979). Clearly, the Board has Jurisdiction over its licensees. Respondent, by accepting the stipulation including the provisions concerning consequences of alleged violation, has acknowledged the authority of the Board to impose discipline for violation of the stipulation. Respondent in his brief did not challenge that authority, instead concentrating on substantive aspects of the case.

The issues involved here concern whether or not respondent violated the stipulation. The stipulation does not by its terms authorize reopening of, or taking disciplinary action for, any of the alleged violations which were at issue in the case which gave rise to it. Counsel for the IP repeatedly made, and the Hearing Officer repeatedly rejected, attempts to prove those charges. The stipulation acknowledged existence of a *prima facia* case and

acknowledged irregularities in record keeping. Respondent specifically did not admit other charges and the complaint alleging those charges was dismissed. By entering the stipulation, respondent bought his peace regarding those charges, and they cannot now be resurrected. Those charges were never proven nor admitted, and cannot be used as a basis for disciplinary action now.

C.R.S. § 12-36-118(5)(g)(IV) provides in pertinent part as follows:

> Upon the failure of the physician . . . to comply with any of the conditions imposed by the hearings panel pursuant to subparagraph (III) of this paragraph (g), unless due to conditions beyond the physician's . . . control, the hearings panel may order suspension of the physician's . . . license to practice in this state until such time as the physician . . . complies with such conditions.

Counsel for respondent argues that this section shifts the burden of proof to respondent to prove that the violations were beyond his control. The Hearing Officer rejects this argument. The subsection does not abrogate the responsibility of the Board to prove that a violation of the stipulation took place. The Act, established rules of procedure, and the APA all require that the Board prove the violations in the first instance. While it may ultimately be an affirmative defense, once violations are proved, that the violations are beyond the control of the physician, such issue does not even arise until a violation is proven.

The Board contends that respondent violated paragraph 12 because it never approved or accepted Dr. Boyd as a monitor, Dr. Boyd did not submit reports to the Board at all, and respondent did not make monthly reports to Dr. Boyd. Respondent contends that he was in substantial compliance with the stipulation because his practice was in fact monitored and no harm to the public arose from it.

This is a classic case of the perils inherent in making assumptions. Respondent assumed Dr. Boyd had been approved by the Board because he notified his attorney and received no adverse or contrary information. Mr. Keller assumed Dr. Boyd had been approved because he received no contrary word and Dr. Boyd appeared obviously acceptable. Mr. Arcuri assumed that Mr. Keller knew that an interview with the Board was required, and so never told to him. Dr. Boyd assumed that he was performing an acceptable monitoring function and did not have to report to the Board. Respondent apparently assumed that Dr. Boyd knew all of his responsibilities under the stipulation and never provided Dr. Boyd with a copy.

The provisions of paragraph 12 were not strictly met because the Board never accepted Dr. Boyd as a monitor and he never filed periodic reports with the Board. Both the Board and respondent are at least partially at fault in this regard. Respondent never provided Dr. Boyd with a copy of the stipulation to assure that he knew of the responsibility to report, nor did he request or obtain copies or ask Dr. Boyd if reports were being sent. The Board never informed respondent what was required for acceptance of a monitor and did not ask respondent

whether a monitor had been arranged when informed in October 1982 that respondent had an office practice.

The Hearing Officer concludes that a technical violation of paragraph 12 occurred. The stipulation does not specify that the monitor be interviewed or formally approved by the Board. Failure to arrange an interview is thus not a violation of paragraph 12. Reports were not provided however, and this is a violation of paragraph 12. The Hearing Officer cannot find a substantial violation of paragraph 12 nor a violation of its spirit, however. Respondent's practice was in fact monitored. He did subject his records of practice to review by a highly qualified and clearly acceptable physician. The nature of the practice and character of the physician involved was such that had any problems arisen, steps would have been taken to correct them. The Hearing Officer cannot find a basis for disciplinary action in the technical violation of paragraph 12.

The IP also alleges that respondent violated paragraphs 9 through 11 of the stipulation in the performance of the papillectomy on Mr. West. More specifically, the Board contends that respondent violated paragraph 9 by not informing the Board prior to performing the surgery, violated paragraph 10 by not obtaining a formal preoperative consultation, and violated paragraph 11 because Dr. Anderson was not present during the entire procedure.

Paragraph 9 requires respondent to notify the Board in writing of the date on which he "will commence the practice of surgery." It does not specify he must inform the Board of the date on which he will perform any

surgical procedure, no matter how minor and no matter where. Clarification to paragraph 11 in the letter of September 9 refers to hospital privileges. These two provisions, read together, only make sense if construed to apply to the *regular practice* of surgery, based in a hospital. Respondent contended the paragraphs 9-11 could only refer to the practice of neurosurgery because that was the nature of his practice and the field in which the prior complaints arose. The Hearing Officer does not construe the provisions so narrowly. Nevertheless, the phrase "commence the practice of surgery" must logically be construed as something more than potentially urgent removal of a lesion in an office under a local anesthetic. The evidence shows that the incident was isolated and did not herald "commencement of the practice" of surgery. The Hearing Officer concludes that respondent has not violated paragraphs 9, 10 or 11 of the stipulation.

The technical violation of paragraph 12 by failure to assure provision of routine and regular monthly reports is not a basis for serious consequences. Respondent has already in effect suffered a suspension of almost four months through the summary suspension. That period of time is far more that is reasonable. No further discipline is warranted for that technical violation. The Hearing Officer finds no other violations, but instead concludes that respondent has been in substantial compliance with the stipulation. It follows that this action ought to be dismissed.

It is important, however, to avoid further misunderstanding if possible. Respondent, his counsel and Dr. Boyd all now know that the Board regards an interview as a prerequisite to approval of a monitoring physician

and that the monitoring physician must submit monthly reports to the Board. Strict compliance with the provision may reasonably be expected in the future. If Dr. Boyd regards the additional tasks of appearing for an interview before the Board and submitting periodic reports as burdensome, or for any other reason decides not to continue as monitor, respondent must find another monitoring physician for his practice, and must comply with the now-known requirements of the Board. The requirements of paragraphs 9 through 11 still apply to any circumstance where respondent intends to commence regular, routine and repetitive practice of surgery.

INITIAL DECISION

IT IS THE INITIAL DECISION of the Hearing Officer that respondent violated that portion of paragraph 12 of the stipulation of August 9, 1982, which requires that the monitoring physician submit monthly reports to the Board of Medical Examiners concerning the respondent's practice. It is the further Initial Decision of the Hearing Officer that the suspension of respondent's license from June 26, 1984 until the date of issuance of this decision is more serious discipline than warranted by that technical violation and therefore no further disciplinary action is warranted. If is the further Initial Decision of the Hearing Officer that the Board of Medical Examiners has failed to prove any of the remaining charges of violation of the stipulation of August 9, 1982, set forth in the formal complaint and order of summary suspension. It is therefore the Initial Decision of the Hearing Officer that this matter be and the same hereby is dismissed.

The parties have the right to appeal this Initial Decision to the Board of Medical Examiners pursuant to the provisions of Colorado Revised Statutes, 1973, § 24-4-105(14) and (15). Any such appeal must be filed within thirty days after issuance of this Initial Decision. Absent such review, this Initial Decision shall become the Agency Decision of the State Board of Medical Examiners.

/s/ Don P. Stimmel
DON P. STIMMEL,
Hearing Officer

DATED: At Denver, Colorado
Oct. 22, 1984

APPENDIX F

BEFORE THE STATE BOARD OF MEDICAL EXAMINERS

STATE OF COLORADO

Proceeding No MS 84 04

FINAL ORDER AND DECISION OF THE COLORADO STATE BOARD OF MEDICAL EXAMINERS

In the Matter of Disciplinary Proceedings Regarding The License To Practice Medicine In The State Of Colorado Of LAWRENCE M. ROBERTSON, JR., M.D.

RESPONDENT

During a meeting held February 15, 1985, the Colorado State Board of Medical Examiners considered the following documents filed in the above-captioned matter:

1. Initial Decision;
2. Inquiry Panel's Exceptions To The Initial Decision;
3. Inquiry Panel A's designation of Record;
4. Motion Requesting Clarification;
5. Ruling on Motion Requesting Clarification;
6. Respondent's Motion To Strike Inquiry Panel's Exceptions And To Terminate Proceedings;
7. Memorandum In Support Of Respondent's Motion To Strike;
8. Brief In Opposition To Respondent's Motion To Strike;

9. Respondent's Reply Memorandum;

10. The Certification of Record filed by the Hearing Officer, and

11. The entire Record filed by the Hearing Officer.

Following deliberation and discussion of the above, it was moved, seconded and carried that the Colorado State Board of Medical Examiners order as follows:

1. The Respondent's "Motion To Strike Inquiry Panel's Exceptions And To Terminate Proceedings" is hereby denied by the Board.

2. The Board hereby accepts and adopts exceptions numbered three (3), eight (8) and eleven (11) filed by the Attorney General on behalf of the Inquiry Panel.

3. The findings of fact contained in the Initial Decision of the Hearing Officer are accepted and adopted by the Board in every respect, except as modified by the granting of exceptions three (3), eight (8) and eleven (11) as set forth above.

4. The Board accepts and adopts the Conclusion of Law contained in the initial Decision of the Hearing Officer that respondent has violated paragraph twelve (12) of the stipulation of August 9, 1982.

5. The Board accepts and adopts the final paragraph of the Conclusion of Law as contained in the Initial Decision of the Hearing Officer.

6. The Board rejects the sanction recommended by the Hearing Officer and hereby orders the imposition of the following sanction:

This matter will be referred to Inquiry Panel A for consideration and resolution of the following:

a. For formal approval of a physician to monitor respondent's medical practice and to provide the conditions for his reimbursement of costs and time.

b. To set forth the conditions of such monitoring, which conditions must include at least monthly reports to the Board.

c. To specifically define the term practice of "surgery" as said term relates to the medical practice of respondent.

d. The restrictions contained in paragraph 9, 10 and 11 of the August 9, 1982 Stipulation on respondent's practice of surgery shall be applicable to respondent by the force and effect of this order for a period of thirty-six (36) months from the date the Board is notified of said resumption of the practice of surgery by respondent.

e. The monitoring of respondent's medical practice other than his practice of surgery required by this order shall extend for a period of twenty-four (24) months from the date the monitoring physician is approved by Inquiry Panel A.

f. Upon approval of the monitoring physician by Inquiry Panel A and the establishment of the conditions for monitoring by Inquiry

Panel A, the summary suspension of respondent's license to practice medicine in the State of Colorado shall be lifted and respondent shall be authorized to resume his practice of medicine in accordance with the terms of this order.

With the stated changes set forth above, the Initial Decision of the Hearing Officer is now the Final Order and Decision of the Colorado State Board of Medical Examiners.

DONE AND SIGNED this 8 day of March 1985.

COLORADO STATE BOARD
OF MEDICAL EXAMINERS,
HEARINGS PANEL B

By: /s/ Stephen R. Kozloff, M.D.
Stephen R. Kozloff, M.D.

/s/ Frederick Paquette, M.D.
Frederick Paquette, M.D.

/s/ Christine A. Petersen
Christine A. Petersen, M.D.

/s/ Molly Sommerville
Molly Sommerville, Esq.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-F-941

LAWRENCE M. ROBERTSON, JR., M.D.

Plaintiff

v.

THE STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO, GENE E. BOLLES, M.D., HENRY G. FIEGER, M.D., NANCY GERLOCK, JACK KLAPPER, M.D., STEPHEN R. KOSLOFF, M.D. ROBERT LEDERER, M.D., NELSON E. MOHLER, D.O., FREDERICK R. PAQUETTE, M.D., CHRISTINE A. PETERSEN, M.D., RAY E. PIPER, D.O., MOLLY SOMMERVILLE, ESQ., BRUCE H. WILSON, M.D. and MICHAEL VITEK, M.D.

Defendants

JUDGMENT

FILED DEC 28, 1987

Pursuant to and in accordance with the Memorandum Opinion and Order dated and entered by the Honorable Sherman G. Finesilver, District Judge, on December 28, 1987, it is,

ORDERED AND ADJUDGED that judgment be entered in favor of the defendants and against the plaintiffs. It is

FURTHER ORDERED that the defendants have and recover their costs upon the filing of a Bill of Costs with

the Clerk of this Court within ten days after entry of this judgment. It is

FURTHER ORDERED that the complaint and cause of action are hereby dismissed.

DATED at Denver, Colorado this 28th day of December, 1987.

FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

BY: /s/ Patricia J. Allen
PATRICIA J. ALLEN, Deputy Clerk

ENTERED
ON THE DOCKET
DEC 28 1987
JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Action No. 87-F-941

LAWRENCE M. ROBERTSON, JR., M.D.,

Plaintiff,

v.

THE STATE BOARD OF MEDICAL EXAMINERS OF THE STATE OF COLORADO, GENE E. BOLLES, M.D., HENRY G. FIEGER, M.D., NANCY GERLOCK, JACK KLAPPER, M.D., STEPHEN R. KOSLOFF, M.D.,

ROBERT LEDERER, M.D., NELSON E. MOHLER, D.O., FREDERICK R. PAQUETTE, M.D., CHRISTINE A. PETERSEN, M.D., RAY E. PIPER, D.O., MOLLY SOMMERVILLE, ESQ., BRUCE H. WILSON M.D., AND MICHAEL VITEK, M.D.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Dec. 28, 1987)

Sherman G. Finesilver, Chief Judge

This matter is before the court on defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(5). Although the motions to dismiss specifically refer to Rule 12(b)(5), the substance of the motions indicate defendants' actually move for dismissal under Fed. R. Civ. P. 12(b)(6). Therefore, we shall treat the motions as filed under Rule 12(b)(6). Since we have considered matters outside the complaint, the motions shall be treated as motions for summary judgment under Fed. R. Civ. P. 56, in accordance with Rule 12(b). For the reasons stated below, defendants' motions for summary judgment are GRANTED.

I.

FACTUAL BACKGROUND

This action arises from certain disciplinary actions taken against plaintiff, a physician, by the State Board of Medical Examiners of the State of Colorado ("Board"). Plaintiff is a physician who practices neurosurgery. A disciplinary proceeding regarding his license to practice medicine in Colorado was originally commenced in 1980.

(Complaint § III, ¶ 1.) On or about August 9, 1982, a Stipulation and Order was entered into between plaintiff and the Board whereby plaintiff agreed to certain monitoring of his surgical practice. (Complaint § III, ¶1.) In approximately May of 1984, information that plaintiff was allegedly failing to comply with the terms of the Stipulation and Order came to the attention of the Board. (Complaint § III, ¶ 7.) Consequently, plaintiff was served with a Summary Suspension of his license to practice medicine. (Complaint § III, ¶ 7.) Thereafter, a hearing was held before an independent hearing officer of the State of Colorado on the issue of whether plaintiff had failed to comply with the terms of the Stipulation and Order. (Complaint § III, ¶ 8.) This was a full evidentiary hearing and plaintiff was represented by counsel. (*Id.*) The hearing officer rendered an initial decision on or about October 22, 1984. (*Id.*) The Board issued its final decision and order on March 8, 1985, recommending that plaintiff's practice be monitored for an additional twenty-four months, setting out the conditions by which monitoring must occur, requiring approval by the Board of any monitor, and requiring that plaintiff notify the Board of any surgical procedure for an additional thirty-six months. (Complaint § III, ¶ 11.) Plaintiff appealed the decision of the Board to the Colorado State Court of Appeals on April 19, 1985. (Complaint § III, ¶ 12.) On September 17, 1987, during the pendency of this action, the Court of Appeals rendered its decision affirming the Board. (Exhibit A, Defendants' Reply Memorandum).

The complaint raises four claims: (1) defendants deprived plaintiff of his property and liberty without due process of law in violation of 42 U.S.C. § 1983; (2) plaintiff

is entitled to exemplary damages under 42 U.S.C. § 1983; (3) defendants' actions were willful and wanton, entitling plaintiff to damages for mental anguish and duress; and (4) defendants should be enjoined from enforcing the stipulation previously entered by the parties. Plaintiff asserts federal jurisdiction arises under 42 U.S.C. § 1983.

II.

ANALYSIS

A. *Immunity Issues*

Summary judgment is appropriate only if there are no genuine issues as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In the reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion, and all doubts resolved in favor of the existence of triable issues of fact. *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F. 2d 1467, 1474 (10th Cir.), *cert. denied*, 106 S. Ct. 77(1985).

The individual defendants, members of the Board, argue they are entitled to absolute immunity from suit for decisions made pursuant to their duties on the Board. We agree. The recent decision by the Tenth Circuit Court of Appeals in *Horwitz v. State Board of Medical Examiners of The State of Colorado*, 822 F. 2d 1508 (10th Cir. 1987) addressed this specific issue. In *Horwitz*, the Tenth Circuit relied on the decision of *Butz v. Economou*, 438 U.S. 478 (1978), in determining that the members of the Board were entitled to absolute immunity.

The Tenth Circuit stated:

> We conclude that under the *Butz* court rationale, the defendant Board members, who performed statutory functions both adjudicatory and prosecutorial in nature, are entitled to absolute immunity form damages liability under 42 U.S.C. § 1983. There exists a strong need to insure that individual Board members perform their functions for the public good without harassment or intimidation.

822 F. 2d at 1515.

Plaintiff's attempts to distinguish this action from *Horwitz* are unpersuasive. Plaintiff argues *Horwitz* involved a situation where suspension occurred due to endangering of the public health and safety, and incidents of substandard care. To the contrary, plaintiff asserts this action involves neither health and safety issues nor substandard practices.

These factual distinctions are insufficient to obviate our responsibility to follow the *Horwitz* decision. Members of the Board are entitled to absolute immunity from personal liability on decisions rendered in the performance of their duties for the Board. The appropriate forum for addressing any perceived inequities in the Board's ruling is with the Colorado Court of Appeals. A suit against the individual members under § 1983 is not actionable.

B. *Sovereign Immunity*

The Board asserts it is entitled to dismissal because the action is barred by the Eleventh Amendment to the Constitution. We agree.

The Eleventh Amendment bars actions against a state, its officers, agents and institutions which are part of the state function. *Edelman v. Jordan*, 415 U.S. 651 (1974). A waiver of Eleventh Amendment immunity must be unequivocally expressed. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 88, 99 (1984). The Board is an agency of Colorado and has not unequivocally expressed its consent to be sued in this court. Therefore, dismissal of the complaint against the Board is appropriate.

C. *Injunction*

Plaintiff's fourth claim for relief, requesting that defendants be enjoined from enforcing the original Stipulation and Order is also subject to dismissal. In *Colorado Board of Medical Examiners v. Robertson*, No. 85CA0569 slip op. (Colo. App. Sept. 17, 1987), the Colorado Court of Appeals affirmed the Board's action, finding that the discipline ordered against Dr. Robertson was not arbitrary or capricious. The ruling by the Colorado Court of Appeals operates to collaterally estop plaintiff's claim for an injunction. *See In the Matter of Lombard*, 739 F. 2d 499, 502 (10th Cir. 1984); *People ex rel. Gallagher v. District Court*, 666 P. 2d 550, 554 (Colo. 1983). Accordingly,

IT IS ORDERED that defendants' motions to dismiss shall be treated as motions for summary judgment. Defendants' motions for summary judgment are GRANTED. Summary judgment is GRANTED in favor of defendants. The complaint and causes of action are DISMISSED.

Done in Denver, Colorado this 28 day of December, 1987.

BY THE COURT:

/s/Sherman G. Finesilver
Sherman G. Finesilver,
Chief Judge
United States District Court

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LAWRENCE M. ROBERSON, JR., M.D.,

Plaintiff-Appellant,

v.

STATE BOARD OF MEDICAL EXAMINERS, an agency of the State of Colorado; GENE E. BOLLES, M.D.; HENRY G. FIEGER, M.D.; NANCY GERLOCK; JACK KLAPPER, M.D.; STEPHEN R. KOSLOFF, M.D.; ROBERT LEDERER, M.D.; NELSON E. MOHLER, D.O.; FREDERICK R. PAQUETTE, M.D.; CHRISTINE A. PETERSEN, M.D.; RAY E. PIPER, D.O.; MOLLY SOMMERVILLE, ESQ.; BRUCE WILSON, M.D.; MICHAEL VITEK, each as individuals of that agency,

Defendants-Appellees.

No. 88-1129

FILED
AUG 16 1989

ORDER

Before MOORE, SETH, and TACHA, Circuit Judges.

This matter is before the court on appellant's petition for rehearing.

The material submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

Entered for the Court

/s/ Robert L. Hoecker, Clerk
ROBERT L. HOECKER, Clerk